

3. Plaintiff's Second Amended Complaint, which brought Triple E into the suit for the first time, does not state a claim upon which relief can be granted because the complaint against Triple E was filed well after the statute of limitations expired. Therefore, the Court should dismiss Plaintiff's suit against Triple E.

II. ARGUMENT

4. A court has authority to dismiss a suit for failure to state a claim upon which relief can be granted under Rule 12(b)(6) if the complaint is barred by the statute of limitations. *Jones v Bock*, 549 U.S. 199, 215 (2007). "Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract." *Id.*

5. Plaintiff's complaint against Triple E is for alleged personal injuries resulting from state claims for negligence and negligence *per se*. See [Doc #80] at p. 4.

6. These allegations trigger the two (2) year statute of limitations in Texas Civil Practice and Remedies Code Section 16.003, which provides that a person must bring suit for personal injury "not later than two years after the day the cause of action accrues." It is well established law in Texas that a negligence claim arising from a personal injury must be brought within two years from the date of injury. See TEX. CIV. PRAC. & REM. CODE § 16.003(a); *Valverde v. Biela's Glass & Aluminum Prods.*, 293 S.W.3d 751,753 (Tex.App.—San Antonio 2009, pet. denied). Triple E asks the court to take judicial notice that the Second Amended Complaint does not allege any cause of action that would fit within the exceptions set forth in Section 16.003.¹

¹ Limited exceptions provided by CPRC Sections 16.010 include: (Misappropriation of Trade Secrets), 16.0031 (Asbestos-Related or Silica-Related Injuries), and 16.0045 (conduct that violates Penal Code Sections 22.011, (sexual assault), 22.021 (aggravated sexual assault), 21.02 (continuous sexual abuse of young children), 20A.02 (trafficking of persons) and 43.05 (compelling prostitution).

7. In paragraph 9 of the Complaint, Plaintiff admits that the accident that forms the basis of her action occurred on May 22, 2013. *See* [Doc #80] pg. 2, para. 9.

8. However, the complaint against Triple E was filed over three (3) years later on September 27, 2016. *See* [Doc #80]. Thus, it is clear from the facts that the Plaintiff's claims against Triple E are barred under the statute of limitations. The facts are (1) "definitively ascertainable from the complaint and other allowable sources of information" and (2) suffice to establish the affirmative defense with certitude." *Gray v Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008).

9. A curative amendment would be futile as there is no dispute on the date of the accident which gives rise to this action. *Travelers Indemn. Co. v Dammann & Co.*, 594 F.3d 238, 256 n. 14 (3d Cir. 2010).

III. **CONCLUSION**

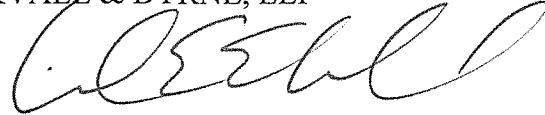
10. Because the personal injury claims against Triple E in Plaintiff's Second Amended Complaint were filed after the statute of limitations expired, the complaint fails to state a claim upon which relief can be granted against Triple E. Therefore, the Court should dismiss Plaintiff's suit against Triple E.

IV. **PRAYER**

11. Defendant prays that Plaintiff's suit against Triple E be dismissed in its entirety and that Triple E recover its costs and be granted such other and further relief to which it may be justly entitled.

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CERTIFICATE OF SERVICE

This shall confirm that a true and correct copy of the foregoing document was served on the following counsel of record on the 14 day of October, 2016:

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